93-571

FILED
OCT - 6 1993
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No.

In The

Supreme Court of the United States

October Term, 1993

NDUCHE CHIMA UWAEZHOKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court erred in finding a racially-neutral and non-pretextual explanation where the Prosecutor's stated rationale for striking one of only two potential black venire persons was that the juror "is a single parent... that rents...[and] may be involved in a drug situation where she lives", in circumstances where the prosecutor was aware that the potential juror was employed by the postal service with four years seniority and had an unblemished record of law-abiding behavior.

2. Whether the Third Circuit was correct in rejecting the view of the Ninth Circuit that a nexus between the particular juror and the facts of the case must exist in order for the prosecutor's explanation of a propose challenge to be facially valid?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	v
Opinion Below	1
Jurisdiction	2
Constitutional Statutory And Rule Provisions Involved	2
Statement Of The Case	2
I. Introduction	2
a. The Question At Issue	2
b. The Third Circuit's Analysis	4
II. Factual Background	5
A. Jury Selection	6
B. The United States' Proofs	8
i.The Arrest and Interrogation of Tony Butts	8
ii.The Substance Of The Monitored Telephonic Communications	11

Page

iii. The Controlled Delivery To Chicago..... 13

iv. The Testimony of Tony Butts..... 14

a. Direct Examination..... 14

b . Cross Examination..... 19

ve.The Arrest of Petitioner And Search Of His Domicile..... 24

Reasons For Granting The Writ..... 26

Point I. Certiorari Must Be Granted To Facilitate A Clear Statement By This Court As To The Interpretative Criteria Regardin Analysis Of Alleged Racially-Neutral Explanations For The Exercise Of Peremptory Challenges.....27

I. Applicable Law..... 31

A. The Rulings of This Court..... 31

i. Batson v. Kentucky..... 31

ii. Holland v. Illinois..... 36

iii. Powers v. Ohio..... 39

iv. Hernandez v. New York..... 41

B. The Opinion Herein And Other Third Circuit Precedent..... 43

i. Jones v. Ryan..... 44

Page

ii. United States v. Uwaezhoke..... 50

a. The Majority Opinion..... 50

b. The Dissent..... 53

II. Certiorari Must Be Granted To Correct The Violation Of Petitioner's Rights..... 57

ii. Available Precedent Outside The Third Circuit Supports Position That A Reversal Is.....58

Point II Certiorari Should Be Granted To Resolve The Dispute Between The Third And Ninth Circuits As To Whether Hernandez Requires A Nexus Between The Particular Juror And The Facts Of The Case.....62

Conclusion.....62

TABLE OF CITATIONS

Cases Cited: *Page*

Alvarado v. United States,____U.S.____, 111 L.Ed 2d 439 (1991)..... 39

Avery v. Georgia, 345 U.S. 559 (1953)..... 34

Batson v. Kentucky, 436 U.S. 79 (1986).....31

Batson v. Kentucky, 476 U.S. 79 (1986).....3

Cunnigham v. Zant, 928 F.2d 1006 (11 Cir. 1991).....60

Hernandez v. New York,___U.S.___,111 S.Ct. 1859, 1864 (1991)..... 41

Holland v. Illinois,____U.S.____, 107 L.Ed 2d 905 (1991).....53

Jones v. Ryan, 987 F.2d 960 (3 Cir. 1993).....4

Martin v. Texas, 200 U.S. 316 (1906).....33

Murchu v. United States, 926 F.2d 50 (1 Cir. 1991).....60

Norris v. Alabama, 294 U.S. 587 (1935).....33

Powers v. Ohio,___U.S.___111 S.Ct 1364 (1991).....39

Stauder v. West Virginia, 100 U.S. 303 (1880).....33

Swain v. Alabama, 380 U.S. 202 (1965).....32

Page

Taylor v. Louisiana, 419 U.S. 522 (1975).....37

Teague v. Lane,____U.S.____, 103 L.Ed 2d 334 (1991)...39

United States v. Horsley, 864 F.2d 1543 (11 Cir. 1989)..61

United States v. Alston 895 F.2d 1362, 1367 (11 Cir. 1990).....59

United States v. Bennett, 923 F.2d 1543, 1551 (11 Cir. 1991) 59

United States v. Bishop, 959 F.2d 820, 825 (9 Cir. 1992)..... 62

United States v. Guerra-Marez, 928 F.2d 665, 673 (5 Cir.....59

United States v. Joe, 928 F.2d 99 (4 Cir. 1991)..... 59

United States v. Uwaezhoke, 995 F.2d 388 (3 Cir. 1992)...1

United States v. Uwaezhoke, 995 F.2d 388 (3 Cir. 1993)...5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NDUCHE CHIMA UWAEZHOKE, PETITIONER

-vs-

UNITED STATES OF AMERICA

PETITION FOR A WRITE OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgments of the Third Circuit entered in this proceeding on May 6, 1993 and June 11, 1992.

OPINION BELOW

The Order of the Third Circuit Court of Appeals is appended to this petition. The opinion of that Court is reprinted as **United States v. Uwaezhoke, 995 F.2d 388 (3 Cir. 1992).** The order of The Third Circuit denying a rehearing is also appended to this petition.

JURISDICTION

This jurisdiction of the Supreme Court to review the Final Judgment of the Third Circuit Court of Appeals is based on **28 U.S.C. §1254(1).**

CONSTITUTIONAL STATUTORY AND RULE PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under the Sixth and Fourteenth Amendments to the United States Constitution.

Statement Of The Case

I.

Introduction

a. The Question At Issue

The instant matter presents this Court with an issue of great public and juridical importance with respect the law relative to review of district court determinations as to the "racially neutral" character of peremptory challenges exercised by the United States. The prosecutor herein exercised a peremptory challenge to strike one of only two potential African-American jurors. Petitioner, who is black,

challenged the exercise as race-based. The district court below required that the prosecutor proffer a "racially neutral" rationale. The prosecutor falsely stated that his office enforced a policy of striking postal workers. Indeed, when the existence of such a policy was challenged by defense counsel, the prosecutor admitted the falsity of that utterance. Another prosecutor present thereafter provided a second proffer wherein he stated that the black juror was struck because she is a single parent, who rents an apartment and is "probably involved in a drug situation where she lives."

We submitted to the district court and thereafter to the Third Circuit Court of Appeals that **Batson v. Kentucky, 476 U.S. 79 (1986)**, clearly governs this situation and mandates reversal of the convictions herein. The United States not only failed to state a "racially-neutral" reason; it proffered a clearly bigoted rationale. The final proposition set forth by the United States, in effect, proved the impermissible stereotypic thinking which underpinned the peremptory challenge. Simply stated, the actual reason for the challenge was the prosecutor's constitutionally impermissible stereotype that "black jurors as a group will be unable impartially

to consider the [government's] case against a black defendant." **Batson v. Kentucky, supra at 89.**

Because he was unable to admit to this stereo-type on the record, the prosecutor in fashioning a pre-textual rationale unwittingly revealed an invidious form of bigoted analysis. He stated that the juror was struck because she was probably "involved in a drug situation where she lives." That observation was completely unfounded and at odds with the juror's background as a trusted postal worker, who had no history of non-law abiding behavior. It, in effect, stated the prosecutor's view that black people are prone to involvement with drugs.

b. **The Third Circuit's Analysis**

Contemporaneous with disposition of this matter, a second panel of the Third Circuit was considering an identical issue in **Jones v. Ryan, 987 F.2d 960 (3 Cir. 1993).** The **Jones** panel issued an opinion approximately two months prior to the decision in the instant matter. The tenor of the two opinions are starkly contrasted. The **Jones** Court reversed a district court determination admonishing courts that "if tension exists between the old tradition of

unconsidered preference for unfettered use of peremptory challenges and the still relatively young tradition of meaningful safeguards against invidious application of racial stereo-types, then the latter consideration must prevail." **Jones v. Ryan, supra at 968.**

The decision herein is in opposition to the principle articulated in **Jones** that the "[too high] price [of the old tradition] would be the jeopardizing of the integrity of the judicial process and stigmatization of venire persons of color". **Jones v. Ryan, supra, at 968**. The divided panel in the instant matter ruled that a prosecutorial explanation "[which] would be likely to have a disparate impact on blacks in the vicinage [need only] be scrutinized with care". **United States v. Uwaezhoke, 995 F.2d 388 (3 Cir. 1993).** More importantly, the panel left a clearly racist explanation undisturbed. The failure of the **Uwaezhoke** panel to perceive the clearly pretextual nature of the explanation indicated a lugubrious lack of insight and/or commitment to prevention of race-based exercise of peremptories.

II.

Factual Background

A. Jury Selection

On February 4, 1991, the jury selection process commenced herein. An issue arose respecting the constitutional propriety of the United States' decision to excuse one of only two potential African-American jurors. Petitioner is black and a native of Nigeria. Counsel objected to the challenge and reasoned that the juror was excused by the United States on purely racial grounds. Simply put, counsel asserted that the United States with a race-based motivation sought to deny a qualified African-American an opportunity to sit on the jury.

The court clearly perceived that the United States' motivations were potentially racial in nature. In this context, the court requested that the United States articulate "the basis for the challenge." In response, AUSA Jason Tannenbaum provided a patently fabricated rationale. He stated:

> We challenged her because its a general policy. She was a postal employee, and we usually just generally don't like to have postal employees on the jury. It has nothing to do with [anything] racial. (emphasis added).

The existence of a general policy as to use of peremptory challenges to excuse postal workers was immediately disputed by defense counsel. Counsel's challenge to the actual existence of such a policy elicited a disclaimer from both of the Assistant United States Attorneys present. In view of the inconsistency between AUSA Tannenbaum's articulation of a policy and his subsequent disclaimer of it, the court pressed the United States for an acceptable and firm rationale for exercise of the challenge. AUSA Bruce Repetto, as opposed to Tannenbaum, replied to the court's second request. He stated:

> This particular juror is employed by the postal service. There is a problem with postal service jurors in these kinds of cases. It is a person that is a single parent, it's also a person that rents, it's a person that may be involved in a drug situation where she lives.

The district court thereafter tersely stated "I'm going to accept the government's (second) explanation." Defense counsel replied "I want to go on the record objecting and asking for a mistrial based upon a deliberate use of a

prejudiced and racial challenge." The district court concluded the exchange by stating "[the rationale] was expanded upon by Mr. Repetto...Motion denied."

B. The United States' Proofs

i. **The Arrest and Interrogation of Tony Butts**

James Sullivan is employed as a United States Customs agent. On July 29, 1990 he participated in the arrest of Tony Butts at Newark International Airport. Butts was arrested in possession of a substantial amount of heroin. He was en route to Chicago, Illinois. Sullivan and other agents interrogated Butts for several hours. The agents' persistence resulted in Butts' agreement to participate in a consensually monitored telephone communication to Chicago.

It should be emphasized that Butts' agreement to cooperate followed many hours of intense interrogation and admonitions that it would "be in [his] best interest [to] deliver someone." Butts was arrested at approximately 5:35 p.m. on July 29. Telephonic attempts to contact Butts'

alleged connection in Chicago commenced approximately four hours later at 9:00 p.m. With reference to the initial calls, Butts advised Sullivan that "he was going to place a telephone call to Chicago, to the number that he had to deliver the heroin." The number utilized by Butts on July 29 did not relate to a telephone installation within petitioner's residence. And, Butts did not identify the person "to whom he was to deliver [the heroin] at that number." He claimed that "he didn't know the name." Butts nonetheless "[insisted] this is the place where he's to deliver the drugs." Four calls were made to the number prior to termination of the effort at midnight. Butts was thereafter lodged overnight in facilities provided by the Port Authority.

The agents resumed their interrogation of Butts of July 30. Indeed, he was awakened at 8:00 a.m. for this purpose. Butts stated to the agents that he dialed an incorrect number on the night of July 29, as part of a specific effort to deceive. Butts explained to Sullivan that "he was scared. He had never been in this type of position before.

He really didn't know what to do, what he should do."[1] Subsequent to his admission of deception, Butts "indicated that he had this second number." However, he again refused to identify the individual whom he expected to contact.

At approximately 11:00 a.m. on July 30, Butts established telephonic contact with petitioner at his [petitioner's] residence." He did not refer to petitioner by any name during the two separate conversations. Prior to placing the call, Butts expressed concern that the person whom he expected to answer the telephone "was going to know that he had been arrested." This alleged concern stemmed from the fact that "the call was supposed to be made on July 29, as soon as [Butts] exited the customs area." Special Agent Peter J. Fox provided Butts with an explanation for use in structuring the telephone conversation. Fox stated:

> I told him to say that there was a fire in Chicago on [July 29], that the

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1 Butts had also previously advised the agents that "the ultimate destination for the heroin was a hotel in Chicago to another party." He retrenched on that position and shifted to another story. Similarly, he at one point claimed to have transported the heroin for a fee of $20,000 and thereafter modified that claim to $10,000. On cross-examination, Butts testified that "when they told me what the stuff [was] worth, I just told them I was getting $20,000".

terminals at the airport had been knocked out because of this fire,' and that is why he could not get his ticket [July 29] and that's why he was calling on [July 30].

ii. **The Substance Of The Monitored Telephonic Communications**

As was previously noted, Butts spoke to petitioner twice on the morning of July 30. During the first conversation, Butts advised petitioner that he lodged the previous evening at his cousin's residence in Newark because "[there] wasn't no ticket [at the airport] waiting for him." Petitioner assured Butts that a ticket was reserved and awaiting his arrival. The conversation concluded with Butts' representation that he was returning to the airport to secure the ticket and would "call...back when he [arrived] there." There is no clear reference to narcotics within the conversation. The singular ambiguous reference is to "Bobby" being afraid and desiring "to come back without nothing". The transcript states **inter alia**:

Petitioner: Yeah, you know I
you know, you
know you

	get all scared now Bobby wants to come back without nothin' , you know what I mean?
Butts:	Yeah.
Petitioner:	I have to call him and let him know because he has to leave in less than six hours.
Butts:	Oh, okay.
Petitioner:	He's going to be upset, you know what I mean?
Butts:	Uh, huh.
Petitioner:	So when are you getting here.
Butts:	Uh, I go I can get over there now t then.
Petitioner:	You going over there right now.
Butts:	I call you back when I get there to the airport.
Petitioner:	Call me when you get to the airport.

Consistent with the false pretense of having to travel to the airport from a residence in Newark, Butts waited a period of time prior to re-establishing contact with petitioner. He thereafter contacted petitioner and utilized the ruse provided to him by Fox that a fire caused a computer outage, resulting in his inability to secure his ticket. The conversation concluded with petitioner's agreement to meet Butts at the Chicago Airport. This second conversation was also devoid of any specific reference to narcotics.

iii. The Controlled Delivery To Chicago

Subsequent to the telephone conversations with petitioner, Butts agreed "to participate in a controlled delivery of the heroin [to Chicago]." To facilitate his plan, Fox accompanied Butts to the American Airlines counter "where a new ticket was issued in Butts' name." In further preparation for the controlled delivery, "the majority of the heroin [was confiscated] and a representative sample [was] placed in the original suitcase."[2] Thereafter, the controlled delivery scheme was set in full motion. Fox testified:

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2 The suitcase originally contained "[1,993] grams of a mixture containing heroin. [That] heroin mixture is 87 percent pure."

> The suitcase [containing heroin] was checked in. I was given a receipt. On the phone I handed that receipt to Tony Butts so he could retrieve the suitcase at the Chicago airport... That suitcase contains a false compartment.

Both Fox and Special Agent Alvin Sims accompanied Butts to Chicago. Butts at no time identified or meaningfully described the individual whom he expected to meet in Chicago. Fox testified that Butts disclosed "on the aircraft [that] it would be a Nigerian male."

Prior to their departure from Newark, the authorities in Chicago were alerted. It was intended that Chicago agents would effect the arrest of the individual who met Butts at the airport. Agents Fox and Sims ceased their participation in the investigation subsequent to Butts' meeting with petitioner and procurement of the suitcase from baggage claim. Fox testified that "[Butts] looked over towards me and then made a motion toward the person that he was standing with and he gave me a nod." Fox stated further:

> I looked over my shoulder and I noticed [petitioner] meet with Tony

> Butts, and at that time we proceeded over to the luggage carousel... I observed Tony Butts retrieve the suitcase from the luggage carousel, and when they walked towards the elevator leading to the parking lot I noticed the other individual looking over his shoulder... I broke off surveillance at that time.

iv. The Testimony of Tony Butts

a. Direct Examination

On direct-examination, Butts testified very succinctly and pointedly. The clarity and inculpatory nature of his direct testimony stands in stark contrast to Butts' statements on cross. On direct, with reference to both his and petitioner's culpability for the offenses at issue, Butts stated:

> [I was arrested] for importing heroin into the United States... [The heroin] was in my luggage. [I came from Singapore... I was headed to Chicago [to] deliver the suitcase to [petitioner].

As to his purposeful efforts to mislead the customs agents subsequent to his arrest, Butts testified "I was just scared because it was my first time being arrested and I was protecting the people who I was working for." Butts

asserted "that night I was protecting [petitioner], Bobby Foster, Patrice Foster and my sister Sheila."

Butts stated that the initial phone number which he provided to the agents related to the residence of "[petitioner's] girlfriend Sonnie." Butts claimed that "Bobby Foster gave me instructions if I couldn't reach [petitioner] at home, call that number there." Butts did not utilize petitioner's residence number initially "because [he] was still protecting him. I wasn't really cooperating." Butts admitted that he did not advise authorities of the participation of Bobby Foster and Patrice Foster in the scheme until "later, later, later afterwards when I was arrested, when I was doing the time."

Foster and Foster alone initiated Butts' involvement in the scheme. Butts stated that "about the first week in July Bobby Foster called me and told me to check on some fares to Singapore." Thereafter, activities commenced with reference to the trip to Singapore. We emphasize that all of the arrangement were made by Foster and Butts.

On the Friday evening prior to his planned departure, Butts had an accident and was hospitalized "the whole

weekend until Monday, [July 23]." Butts testified that Bobby Foster, petitioner, Sonnie and Patrice Foster visited him in the hospital. Bobby Foster allegedly inquired whether "[Butts] was going to be able to go on the trip." Butts apparently responded in the affirmative. Foster met Butts at the hospital immediately after his discharge. Butts testified that "[Foster] said if I could [travel] we will leave for [Singapore] tomorrow, that Tuesday morning."

Thereafter, Butts and Foster left as planned. According to Butts, Foster informed him at the hotel in Singapore that he intended to contact "Sonny". Thereafter, Foster engaged in a telephone conversation with an individual whom he referred to as "Sonny." Foster described "Sonny" to Butts as being petitioner's brother. The individual identified to Butts as "Sonny" subsequently arrived at the hotel. "Sonny" and Foster allegedly transacted an exchange of money at that juncture. Butts testified:

> We was introduced and Bobby went to his suitcase, luggage, and gave Sonny a package...[Sonny] took the carbon paper off [and] the rubber band and put everything in

> the garbage and he had money in his hand...[Sonny] asked Bobby did he have any extra spending money. If he didn't [he] would have to call [petitioner] and have some money wired down.

Butts next saw Foster and "Sonny" on the following day. Butts was allegedly advised by Bobby Foster that "he had talked to [petitioner]". According to Butts, Bobby Foster stated that petitioner informed him (Foster) that Patrice Foster "might [be traveling] to Singapore, but [Foster] didn't know for sure." At a later point that day, "[Foster] told [Butts] that he had to pick up Patrice at 12 midnight because she was coming down." This conversation concluded Butt's contact with Foster on that day.

"On Friday, about noontime, Sonny and his friend brought two suitcases over to the hotel." Butts was informed that "heroin [was] in the compartment of the suitcase." Butts testified:

> Bobby Foster laid the suitcase on the bed, and Bobby was examining the suitcase...At that point he told me it was heroin in the compartment of the suitcase...[Sonny] told Bobby that this suitcase go first and then the

> other suitcase go next, and then Bobby and Sonny took one of the suitcases up to Patrice Foster's room.

"[O]n Saturday...Patrice [Foster] left Singapore." Butts spent the day with Sonny and Bobby Foster. Butts was scheduled to leave on Sunday. Foster allegedly provided him with certain instructions. Butts stated:

> On Sunday, on the way to the airport, Bobby told me that [petitioner] will pay me, give me my money when I get to Chicago, and to call [petitioner] when I get to Tokyo...he just said to call [petitioner] when I get to Tokyo and check to see where my ticket was...[I was] to deliver the suitcase to [petitioner]...I tried to call [petitioner] when I got to Tokyo and I didn't get any contact with him, you know, so I came back to Newark and I was arrested.

b. Cross Examination

Cross-examination commenced with Butts' acknowledgment that he provided "many different statements...to the authorities about this business at Newark Airport and Tokyo and Singapore...several times [and] each one different." Butts' alleged primary purpose for

misleading authorities was to protect Bobby Foster who was intimately involved with Butts' sister (Sheila) and had fathered her child. Indeed, the "[final] story that Butts [testified to in court]" was not conveyed to authorities until a "few days" prior to trial. Prior to trial, Butts admittedly "lied continuously."

In this context, the United States failed to adduce in its direct examination that Butts initially advised authorities that an individual identified as "Carl" made all of the Singapore arrangements.[3] Butts claimed to have met Carl in a nightclub. Butts further stated to authorities that the ultimate destination of the heroin was "a hotel in Chicago to another party." As to his having made this latter false statement, Butts had a failure of recollection at trial.

Butts on cross-examination conceded that the funds wired to Foster in Atlanta allegedly by petitioner's girlfriend "could well have been [money] to buy Sheila a car" as opposed to funds related to the Singapore trip. The probability that the funds were for a purpose other than

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[3] Butts unequivocally denied that he at any time stated to authorities that petitioner "made arrangements to pick up heroin in Singapore." He stated that inclusion of such information in an agent's report was in error.

financing the Singapore trip is bolstered by the fact that Butts and Foster "bought the [Singapore] tickets before the money ever came." So too, on cross-examination Butts conceded that "[petitioner] never discussed anything with [him] about drugs."

In one of his several prior statements to the authorities, Butts claimed that he was provided a phone number in Singapore which he used to arrange the delivery of heroin to himself. That story excluded any mention of Bobby Foster and/or Sonny. Specifically, contrary to the account of his receipt of the heroin testified to at trial, Butts previously stated "he called [a] telephone number and arranged to have the suitcase picked up and returned with the heroin in it while he was out of the room [because] he did not want to see who delivered the heroin to his room and did not want them to see him." Butts' testified that his decision to cooperate evolved from the agents' admonition to him "that [he] was looking at ten to life and [should not] lie to [them]."[4] Notwithstanding that admonition, Butts "[was]

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4 It is noteworthy that Butts was placed on bail pending his testimony in petitioner's trial and disposition of his own charges.

lying all along... [and] telling [the agents] all along that the lies were the truth."

Butts' decision to lie about the amount of his alleged compensation for participation in the scheme prompted a series of questions as to the motive for such a lie. There was no "difference between getting $10,000 and $20,000." Butts stated "It was just a lie." That answer precipitated the following exchange:

Counsel:	Do you often lie without any point, just lie?
Butts:	I lie.
Counsel:	And in this particular case you lied with no point at all, just lied.
Butts:	I just lied.
Counsel:	No reason, just lied?
Butts:	No reason, just lied.

Butts also revealed on cross-examination that Bobby Foster shared an apartment with petitioner in Chicago. Accordingly, the telephone number which Butts utilized to

contact petitioner was also the domicile of Bobby Foster. Butts "used to call [Foster] at that number."

The most critical aspect of Butts' testimony on cross-examination was his disclosure that Bobby Foster told him (Butts) in Singapore that he (Foster) was going to purchase [jewels] for [petitioner] to bring back because they were cheap." Foster thereafter advised Butts that "he [did not have] the money to [purchase jewels for petitioner]." This disclosure was critical because it explained petitioner's comments to Butts in the first telephone conversation. In that conversation, petitioner stated to Butts "Yeah, you know I you know, you know you get all scared now Bobby wants to come back without nothing, you know what I mean."

Petitioner's comment was interpreted on direct examination as indicating petitioner's awareness that Butts and Foster were transporting heroin from Singapore. With respect to that passage within the conversation, Butts conceded on cross-examination that petitioner could well have been referring to jewels. In this context, Butts iterated that petitioner did not make any reference to drugs either "in

[the] conversation in Newark or when [Butts] got to Chicago." And, "from start to finish, from Newark to Chicago, right up to [the arrest], Butts never told the [agents that petitioner] was the guy... [or that] he had anything to do with drugs." Petitioner was implicated only after he appeared at the airport.

v. The Arrest of Petitioner And Search Of His Domicile

Carol Czech is employed by the United States Customs Service in Chicago. She was assigned to participate in apprehension of whomever met Tony Butts at the Chicago airport. Czech and agent Anthony Macisco essentially effect the arrest. Czech stated:

> [We] met agent Fox as he exited an American Airlines Flight. I turned around to observe a subject fitting the description of Tony Butts meet with a subject who was later identified as [petitioner]... Then the defendant and Butts got on the elevator, myself and Mr. Macisco and two other agents are also in the elevator, the six of us on the elevator at that point...I observed Butts and [petitioner] go to a Blue Toyota. The defendant opened the hatch of the Toyota. Then Butts went around to the passenger side,

> the defendant to the driver's side, and at that time Mr. Macisco and myself arrested the defendant.

Subsequent to the arrest, petitioner and Butts were separated. Agent Macisco assumed custody of petitioner. Macisco requested and received petitioner's consent to search his residence. Petitioner stated to Macisco "come on in, I have nothing to hide." Petitioner allegedly requested that the handcuffs [be] removed and that the number of agents [be limited]." The agents agreed and when "[they] got to [petitioner's] apartment the handcuffs [were removed]." Petitioner resided in "a small one-bedroom apartment overlooking Lake Michigan. During the course of the search, the agents found a scale; box of baggies; some mobile phones and a digital pager; $50,400 in United States currency, and a suitcase with a false bottom in it. Petitioner also led the agents to .25 caliber automatic pistol, immediately upon entering the premises. The above items were admitted into evidence by the United States.

On cross-examination, defense counsel elicited that the agents also found "two W-2 forms made out in the name of [petitioner], one for 1988 and the other for 1989." The

forms indicated that petitioner was employed by the "Mandela Beauty Salon for both years." Defense counsel also adduced that the money was found in different envelopes in a briefcase. For example, $12,000 was found in a white envelope with a "First Commerce Bank of Chicago" marking. Another $14,000 was found in an envelope marked "Uptown National Bank of Chicago." Macisco also admitted that petitioner informed him that the money was "'used in his cosmetics business." Moreover, Macisco testified that all of the items seized from petitioner's residence could be used for lawful purposes. Indeed, Macisco stated that "there [is no] proof that [any of] these items have been used in connection with the drug trade."[5]

Based on the foregoing evidence, the jury convicted petitioner of each of the offenses set forth in the indictment. The Third Circuit affirmed. This Petition follows.

Reasons For Granting The Writ

Point I

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5 Defense counsel also adduced evidence that mail was forwarded to petitioner's residence in the name of Andrew Ukaegbo. That apparently is Bobby Foster's legal name.

Certiorari Must Be Granted To Facilitate A Clear Statement By This Court As To The Interpretative Criteria Regarding Analysis Of Alleged Racially-Neutral Explanations For The Exercise Of Peremptory Challenges

Petitioner was indicted in the District of New Jersey and charged with various offenses related to narcotics trafficking. Petitioner is black and a native of Nigeria. At the time of trial herein, he was a legal resident of the United States domiciled in Chicago. During the jury selection process despite the relatively high racial heterogeneity associated with the New Jersey vicinage, only two African-Americans were seated on the petit jury venire as potential jurors. The United States exercised a peremptory challenge to excuse one of the only two African-American potential jurors. Defense counsel challenged the United States' exercise of a peremptory to strike her as being race-based.

The district court required that the United States articulate a non-racial basis for exercise of the challenge. The AUSA who exercised the challenge falsely stated that the United States Attorney in this federal district formulated

a policy for application in criminal trials which mandated peremptory challenge of postal workers. When pressed for the origin of this policy or proof of it, both prosecutors present disclaimed its existence. When provided yet another opportunity to propound an acceptable basis, the second AUSA present stated that the potential juror was challenged because of her status as a single parent and an individual who resides in a leased apartment. According to the AUSA, the latter attribute (apartment lessee) rendered it likely that the potential juror was involved "in a drug situation where she lives."

We submit that it cannot in good conscience be gainsaid that the United States' peremptory challenge to the potential African-American juror was race-based. The AUSA who exercised the challenge uttered an obviously false rationale to the district court. As opposed of being startled and affronted by the obvious fabrication, the district court calmly provided the United States with an opportunity to concoct a more acceptable basis for purposes of protecting

the record.[6] That second opportunity in our view elicited clear proof of the race-based and bigoted nature of the challenge. Specifically, it reaped a plainly racist and negative characterization of the potential juror. The first prong of the negative characterization was predicated upon the fact that the potential juror was a single parent without financial means to own a home thereby requiring that she rent.

There is no comprehensible basis upon which the status of single parent and apartment lessee renders an individual unqualified as a juror, absent resort to prejudiced criteria based on bigoted moral or economic class distinctions. In this context, we stress that the most obvious proof of bigotry-motivated exercise of the peremptory challenge is not derived from the prosecutor's view that the juror was unqualified because she is a single parent and relatively impecunious. While reprehensible and unrelated to any recognized qualification, the first prong pales in comparison to the second-prong of the stated rationale. The unassailable proof of race-based motivation is

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6 The hesitance of courts to act when confronted with clear evidence of racial discrimination is a primary factor in perpetuation of racist practices. In refusing to recognize it, the court in effect countenanced it.

the prosecutor's unsubstantiated and absurd claim that the potential African-American juror was "likely involved in a drug situation where she lives." That observation is at odds with the potential juror's work history and the fact that she has no prior record of non-law abiding behavior.

This latter observation of the AUSA is predicated upon the most rank form of racially misguided stereotyping. He has assumed that a black single parent, who rents an apartment, is necessarily involved in a "drug situation" in their community. It cannot be seriously questioned that a Caucasian single parent, who rented an apartment, would not have been viewed in this fashion. In any event, without regard to the stated rationale, it is clear that the potential juror was challenged exclusively because of her race. Although it unwittingly provided clear evidence of bigoted thinking, the stated rationale was manufactured to conceal an obvious race-based exercise. The peremptory challenge herein was based on the prosecutor's misplaced view that the potential juror would favor the black defendant's case. Nothing in the juror's background indicated that she would be

unable to impartially consider the criminal liability of a black defendant.

This Court must grant certiorari to set forth a thorough and practical analysis of the circumstances at issue herein. It is respectfully submitted that honest and concerned review mandates granting of the writ and ultimate reversal of the convictions obtained herein in violation of the Sixth and Fourteenth Amendments. Due process and its protection both of the petitioner's rights and the dignity of potential African American jurors demands no lees than a resounding condemnation of the challenged conduct. Prior opinions of this Court have resulted in progress. Utilization of this case as an example will facilitate movement beyond progress to actual remedy.

I.

Applicable Law

A. The Rulings of This Court

i. Batson v. Kentucky

In **Batson v. Kentucky, 436 U.S. 79 (1986)**, this Court considered the claims of a black petitioner who

demonstrated that "the prosecutor [in his trial] used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected." The petitioner in **Batson** alleged that the "prosecutor's removal of the black venire men violated [his rights under the Sixth and Fourteenth Amendments] to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws." **476 U.S. at 83**. The Court in **Batson** commenced its analysis with a discussion of the opinion in **Swain** v. **Alabama, 380 U.S. 202 (1965).**

In **Swain**, this Court previously recognized that "purposeful or deliberate denial to [Blacks] n account of race of participation as jurors in the administration of justice violates the Equal Protection clause." **380 U.S. at 203-204.** The **Batson** Court stated:

> More than a century ago, the Court decided that the State denies a Black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded... That decision laid the foundation for the Court's unceasing efforts to eradicate racial-

> discrimination in the procedures used to select the venire from which individuals are drawn...Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure. [**476 U.S. at 85**]. (emphasis added)

In this context, it should be emphasized that "a defendant has no right to a petit jury composed in whole or in part of persons of his race" but he "does have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria." **Batson v. Kentucky, supra at 85-86. Cf. Stauder v. West Virginia, 100 U.S. 303 (1880); Martin v. Texas, 200 U.S. 316 (1906)**. Simply stated, the United States may not exclude members of the defendant's race from the jury venire on account of race, or on the false assumption that members of the defendant's race are not qualified to serve as jurors. **Batson v. Kentucky, supra at 86. Cf. Norris v. Alabama, 294 U.S. 587 (1935).**

The **Batson** Court emphasized that the harm in a biased selection process extends both to the defendant and the racially-excluded juror. Therefore, the law recognizes that "by denying a person participation in jury service on

account of his race, the [United States] unconstitutionally discriminated against the excluded juror." **Batson v. Kentucky, supra at 87.** The **Batson** Court iterated a principle of long-standing that acceptance of racist practices within the administration of justice is particularly harmful. The Court in **Batson** stated:

> Discrimination within the judicial system is most pernicious because it is a stimulant to that race prejudice which is an impediment to securing black citizens that equal justice which the law aims to secure to all others." **[476 U.S. at 87-88].**

Based upon the legal precedent before it, the **Batson** court pronounced that "the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors." **476 U.S. at 88**. Therefore, the law "forbids discrimination on account of race in selection of the petit jury." **Id.** Accordingly, the United States may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at other stages in the selection process. **Id.** See, **Avery v. Georgia, 345 U.S. 559 (1953)**. Thus, a prosecutor's privilege to strike individual jurors through peremptory challenges is subject to

the commands of due process and equal protection. In short, due process and equal protection forbids the prosecutor to peremptorily challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the case against a black defendant. **Batson v. Kentucky, supra at 89.**

To facilitate meaningful challenge to race-based exercise of peremptory challenges, the **Batson** Court delineated clear criteria. The Court stated:

> A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group...and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race...the defendant is entitled to rely on the fact...that peremptory challenges constitute a jury selection practice that permits those to discriminate...The defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that

> practice to exclude the venire men from the petit jury on account of their race...Once the defendant makes a **prima facie** showing, the burden shifts to the [United States] to come forward with a neutral explanation for challenging black jurors... The prosecutor therefore must articulate a neutral explanation related to the case to be tried. [**476 U.S. at 96-98**]. (emphasis added).

ii. Holland v. Illinois

In **Holland v. Illinois,____U.S.____, 107 L.Ed 2d 905 (1991)**, this Court considered two questions left unresolved in **Batson**. Those questions are (1) whether a white defendant has standing to raise a Sixth Amendment challenge to the prosecutor's exercise of peremptory challenges to exclude all black potential jurors from his petit jury, and (2) whether such exclusion violates his Sixth Amendment right to trial by an impartial jury. The **Holland** Court ruled that a white defendant does have standing to raise a Sixth Amendment challenge to exclusion of blacks from his jury. The Court in **Holland** stated "the Sixth Amendment entitles every defendant to object to a venire

that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs." **107 L.Ed 2d supra at 914.** See, **Taylor v. Louisiana, 419 U.S. 522 (1975)** (A man has standing to challenge exclusion of women from the jury).

The problem identified by the Court in **Holland** is that the petitioner sought "an extension of the fair cross-section requirement from the venire to the petit jury." **107 L.Ed 2d supra at 914**. According to the **Holland** majority, the variation from venire to petit jury calls into question the scope of the Sixth amendment guarantee, not the defendant's standing to assert it. **Id.** The **Holland** Court rejected the proposition that a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to a fair possibility of a representative jury. **Id. at 915.** The **Holland** Court ruled that the Sixth Amendment is satisfied by "inclusion of all cognizable groups in the venire." **Id.** In this context, the **Holland** Court distinguished the Sixth Amendment claim before it from the equal protection right at issue in **Batson.**

Unlike the Sixth amendment, equal protection because of "[its] intransigent prohibition of racial discrimination applies both to the venire and petit jury." The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does). **Id. at 916.**

With respect to applicability of the Fourteenth Amendment claim ruled upon in **Batson**, the **Holland** Court stated "Race as such has nothing to do with the legal issue in this case." **Id. at 920**. The Court in **Holland** stated further:

> We do not hold that the systemative exclusion of blacks from the jury system through peremptory challenges is lawful; it obviously is not...we do not even hold that the exclusion of blacks through peremptory challenges in this particular trial was lawful. Nor do we even hold that this particular (white) defendant does not have a valid constitutional challenge to such racial exclusion. All we hold is that he does not have a valid constitutional challenge based on the Sixth Amendment-which no more forbids the prosecutor to

> strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other generalized characteristics. [107 **L.Ed 2d supra at 920-921**].

See, **Teague v. Lane,____U.S.____, 103 L.Ed 2d 334 (1991); Alvarado v. United States,____U.S.____, 111 L.Ed 2d 439 (1991).**

iii. Powers v. Ohio

Subsequent to its opinion in **Holland v. Illinois, supra**, this Court revisited the principles at issue therein in **Powers v. Ohio,___U.S.___111 S.Ct 1364 (1991).** The petitioner in **Powers**, a white man, objected in his trial when the prosecutor exercised his first peremptory challenge to remove a black venire person. The trial court over-ruled the objection. Unlike the petitioner in **Holland**, the petitioner in **Powers** relied upon the Fourteenth Amendment as opposed to the Sixth Amendment. In **Holland**, this Court ruled that "the Sixth Amendment did not restrict the exclusion of a racial group at the peremptory stage." **Powers v. Ohio supra at 1367.**

The State of Ohio argued in **Powers** that even under a Fourteenth Amendment analysis "the race of the objecting defendant constitutes a relevant pre-condition." **111 S.Ct. supra at 1368.** The **Powers** Court rejected that position. The Court stated:

> **Batson** was designed to serve multiple ends, only one of which was to protect individual defendants from discrimination in the selection of jurors...a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large...Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all the people [**111 S.Ct. supra at 1368**]

Based upon this analysis, the **Powers** Court rejected "the view that race-based peremptory challenges survive equal protection scrutiny because members of a all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors." **111 S.Ct. supra at 1370.** Accordingly, the **Powers** Court enunciated the principle that "race is irrelevant to a defendant's standing to object to the

discriminatory use of peremptory challenges." **111 S.Ct. supra at 1373**.

iv. Hernandez v. New York

In **Hernandez v. New York,___U.S.___,111 S.Ct. 1859, 1864 (1991)**, this Court granted certiorari to consider the claim of a Latino petitioner that "the prosecutor...exercised preemptory challenges to exclude Latinos from the jury by reason of their ethnicity. A New York State court found that no constitutional violation occurred. This Court framed the issue as a determination "whether the prosecutor offered a race-neutral basis for challenging Latino potential jurors." **Id.**

The reason for exercise of the challenges articulated by the prosecutor was that "[he felt] very uncertain that [the Latino potential jurors] would be able to listen and follow the interpreter." **Id.** The prosecutor stated further:

> I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses...I feel that in a case

> where the interpreter will be for the main witnesses, they would have an undue impact upon the jury. **[111 S.Ct. supra at 1864-1865].**

The **Hernandez** Court thereafter clarified the parameters of an acceptable "race neutral explanation" and the analysis to be undertaken by courts subsequent to the offering by the State of such an explanation. The Court in **Hernandez** stated:

> A neutral explanation ...here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. **[111 S.Ct. supra at 1866].**

Once the prosecutor offers a race-neutral basis for his exercise of preemptory challenges, the trial court then has the duty to determine if the defendant has established purposeful discrimination. In this context, the **Hernandez** Court stated that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts including the fact, if it is true, that the classification bears

more heavily on one race than another." **111 S.Ct. supra at 1868.** Stated somewhat differently, "if a prosecutor articulates a basis for preemptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." **Id.**

B. The Opinion Herein And Other Third Circuit Precedent

The Third Circuit's opinions in **Jones v. Ryan, supra,** and the instant matter are analytically at odds. Accordingly, the need for guidance by this Court has resulted in an internal conflict within the Circuit. We stress that the panel herein was divided. The Honorable Louis H. Pollak, U.S.D.J., sitting by designation, dissented. Judge Pollak expressed a concern regarding explanations which "as unadorned verbal propositions [are] race-neutral" but nevertheless clearly invoke the specter of pretextuality. **United States v. Uwaezhoke, supra at 31**. The majority of the panel did not share Judge Pollak's concern and sensitivity.

It is highly probative that Judge Pollak cited **Jones** for the proposition that the majority did not appreciate that the issue "at bar [goes] to the core of **Batson** and hence [is] of great importance to the due administration of equal justice under law". A comparative analysis of the opinions in **Jones** and **Uwaezhoke** indicates that a clear confusion exists relative to the Third Circuit's position and standards relative to review of the question of race-based exercises of peremptory challenges.

i. Jones v. Ryan

The defendant in **Jones** appealed from denial of his writ of **habeas corpus**. He argued that the prosecution used its peremptory challenges to improperly "strike black persons from the jury in violation of his right to equal protection under the Fourteenth Amendment." **Jones v. Ryan, supra at 962**. The Court in **Jones** found that the defendant "established a **prima facie** case of purposeful discriminatory exercise of peremptory challenge [and] that the prosecution failed to articulate neutral and non- pretextual explanations for striking black persons from the jury."

Id. Accordingly, an equal protection violation was identified and a remedy granted.

The defendant in **Jones**, a young black man, was charged with the robbery of an elderly white man. During jury selection, the venire panel consisted of 40 persons, 32 of whom were white and eight were black. Of the eight black venire persons, four were called for voir dire. The prosecutor exercised four of his seven peremptory challenges. He used three of the four to strike all but one of the black venire persons called. The defense objected but the trial court refused to make any specific findings. Rather, the trial court opined that "a motion like this is divisive...Attorneys are creating racial hatred in this City." **Jones v. Ryan, supra at 962-963.**

At sentencing, defense counsel re-raised the issue as part of post-verdict motions. The court again refused to make a finding opting instead to state "your office is promoting racism in the court...and I think its unfair in provoking trouble within our community." **Id at 963**. The prosecutor thereafter gratuitously offered his reasons for usage of the challenges. He stated:

> One of the venire persons named Idonia Young was stricken because she had a son approximately the same age as Jones. It is my general policy that if at all possible, trying to avoid putting someone who has a child of approximately the same age [as the defendant] on the jury. The second venire person, named Karen Welton, was excluded because...my general policy...if there's a young potential juror as the same approximately age and race of the defendant as a general rule, if I have enough strikes I will keep them off the jury...That's my policy...to avoid any potential, any attraction, any given potential between the juror and the defendant...The third venire person, named Roy Sidberry, was excluded because I attempted to make eye contact with [him] and he sat rigidly in his seat and refused to make eye contact with me. [**Jones v. Ryan, supra at 964**].

The defendant filed a **habeas corpus** petition. The district court found the reasons articulated by the prosecutor to be adequate and non-pretextual. The **Jones** Court reversed. The Court in **Jones** stated:

> The prosecutor's explanation that his general policy of excluding jurors whose children were the same approximate age of the

defendant was the reason for challenging Ms. Young does not satisfy the concerns of **Batson**. The record reveals that the prosecutor did not apply this general policy to two white venire persons who possessed the identical characteristic of having children who were in the same age category as the defendant. Mr. Kolodziej had a nineteen year old son and two twenty year old daughters, nevertheless he was empaneled as a juror. App. at 34-35. Ms. Eisler had two sons, age twenty and a twenty-two, and she also served as a juror. Id. at 37. The presence of white jurors who possessed the same characteristic indicated that this explanation was pretextual.

The prosecutors reason for striking Ms. Welton was based on her race as it was specifically referenced in his explanation. The prosecutor stated "if there's a young potential juror as the same approximate age and race of the defendant, as a general rule, if I have enough strikes, I will keep them off the jury." Supp. App. at 24 (emphasis added). "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race..." Batson 476 U.S. at 89.

The prosecutor's alleged general policy designed to eliminate even the potentiality of attraction between a juror and a defendant of the same age did not apply to several single white women who were empaneled as jurors, nor did it extend to one white woman who served as an alternate juror. Ms. Rajauski, an unmarried white woman from South Philadelphia was empaneled. App. at 31, 37. Ms. Kovach, an unmarried white woman from Manayunk, sat as an alternate juror. Id. at 39. Although the prosecutor tried to disclaim his statement that race was a factor in this particular peremptory policy, his explanation and application included race as a factor. The prosecutor did not exclude single white women from serving as jurors or alternates. Similarly situated white women apparently were not within the scope of the prosecutor's potential attraction theory. Race was identified as a basis to strike a black venire person. That discriminatory intent was inherent in the explanation given by the prosecutor. The Supreme Court has stated that a neutral explanation "means an explanation based on something other than the race of the juror." Hernandez, 111 S.Ct. at 1866. No such explanation was given here.

The prosecutor attempted to provide policy reasons as explanations for striking Ms. Young and Ms. Welton. However, general policy explanations, proffered in "good faith," may nonetheless stand in violation of the law presented in Batson. The Batson Court set forth the requirement that the prosecutor "must articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 98. As the Court noted in Hernandez, general policy reasons may be found to be pretextual where the venire persons are challenged "without regard to the particular circumstances of the trial or individual responses of the jurors." 111 S.Ct. at 1873. The prosecutor's stated policy reasons did not meet the burden imposed by Batson because they are not related in any real sense to the particular events which transpired during the voir dire proceedings in his case. If, as the prosecutor claimed, venire persons who were parents of children of the same approximate age as Jones were unable to serve as impartial jurors, then the prosecutor should have challenged the two white jurors who possessed the same disability as Ms. Young. The record also indicates that the policy used to eliminate Ms. Welton was discarded where the venire persons

> were white women like Ms. Welton, single again like Ms. Welton, but white unlike Ms. Welton. **[Jones v. Ryan, supra at 973-974]**

ii. United States v. Uwaezhoke

a. The Majority Opinion

A divided panel of the Third Circuit found that "the government's explanation for excluding the juror herein was not facially invalid as a matter of law, and that the district court was not clearly erroneous in finding an absence of actual discriminatory intent." **United States v. Uwaezhoke, supra at 391**. The majority of the panel described the explanation accepted by the district court as relating to the juror's personal circumstances. The Court set forth its synopsis of the explanation. The Court stated:

> [The fact that the juror was] a single parent living in a rental property in the City of Newark who was supporting herself and two children on the income of a postal worker with four years tenure suggested to the government that she may be involved with a drug situation where she lives. **[United States v. Uwaezhoke, supra at 391]**

The majority set forth the ratiocination for finding this explanation to be race-neutral. The Court stated:

> The government here claims that, because of Ms. Lucas' likely place of residence, she was more likely to have had direct exposure to a drug trafficking situation than other potential jurors as a class and that the government could legitimately prefer to assume the least risk of a juror having had such an exposure. Whether or not one accepts his explanation as an accurate description of the government's motivation in challenging Ms. Lucas, it is clearly race-neutral on its face.
>
> The prosecutors, at the time they exercised the peremptory challenge, knew that Ms. Lucas was a single parent of two children who was making the salary of a postal worker with four years of seniority and renting an apartment in Newark, New Jersey. It is, we believe, fair to infer that the prosecutors, in the absence of any more detailed information concerning Ms. Lucas, speculated that she might live in low income housing in Newark. Having so speculated, the prosecutors inferred that Ms. Lucas was more likely to have had direct exposure to drug trafficking than someone who did not live in low-income housing in

> Newark. While this conclusion may or may not be empirically correct, we cannot say that it exhibits racially discriminatory intent as a matter of law.....
>
> While it is certainly conceivable, as Mr. Uwaezhoke suggests, that the prosecutor took one look at Ms. Lucas' color and thought. "Blacks who live in poor neighborhoods cannot be trusted to fairly enforce drug laws against other blacks", it is equally possible that the prosecutor concluded that anyone, regardless of color, who lives in a poor neighborhood in Newark may have had personal experience with drug trafficking that would make their reaction to trial evidence unpredictable. We cannot find that discriminatory intent was inherent on the face of the government's explanation, and so we hold that the explanation is valid as a matter of law. If there was actual racial discrimination lurking behind this explanation, it can be found only as a matter of fact. **[United States v. Uwaezhoke, supra at 393-394].**

The majority also ruled that an explanation which is "otherwise racially neutral on its face is not infirm solely because its repeated application would have a disparate impact on a particular racial group, that is, would result in the

exclusion of more members of one racial group than members of other racial groups." **United States v. Uwaezhoke, supra at 393.** The majority fashioned "a scrutiny with care" standard of review of disparate impact. This ruling was significant because the court found that the explanation herein, "if generally applied, would be likely to have a disparate impact on blacks in the vicinage and accordingly, is one that should be scrutinized with care." **Id at 394-395** The Court stated:

> If the government's explanation, generally applied, would have a disparate impact on a particular racial group this fact should cause a trial judge to exercise special scrutiny during the this step of the **Batson** process to determine whether intentional discrimination, as a matter of fact, underlies the government's peremptory challenge...But the role of disparate impact in the **Batson** analysis is as circumstantial evidence of discriminatory intent at the third stage and not as a controlling factor at the second. **[Id at 393].**

b. The Dissent

Judge Pollak dissented initially expressing a concern regarding the majority's conclusion that the district court did

not consider the "postal worker policy" in its decision. Judge Pollak demonstrated that such a policy would significantly and disparately reduce "black juror presence on venires." **United States v. Uwaezhoke, Id at 397-399.** Judge Pollak recommended "a remand to the district court to permit a determination by that court of whether the postal worker explanation is one to which it gave any weight." **Id, at 399.**

With regard to the stated rationale that "its a person involved in a drug situation where she lives", Judge Pollak expressed difficulty. "Those difficulties stem from what appears to be the inevitable compromise of racial randomness in jury selection that flows from that rationale. " **Id at 400.** Judge Pollak stated:

> Routinely to exclude from jury service in drug cases tried in the Newark federal courthouse a category of potential jurors defined by residence in Newark will have a substantial skewing effect on the racial composition of the juries thus selected. As has been noted, some 600,000-- or approximately one-fifth --- of the residents of the seven-county catchment area feeding the Newark federal courthouse are black. But, in Newark proper, blacks constitute 58.5% ---

approximately 160,000 --- of a city population of 275,000....

Of course the government's rationale does not necessitate striking all 160,000 blacks residing in Newark. The government's concerns center on persons "living in a low-income area." But that qualification does not necessarily carry with it much reassurance. Indeed, it may serve only to compound the difficulty. The government has not offered a description, in dollar metes and bounds, of Newark's "low-income area"; in the absence of such a description, we may be warranted in assuming that the government, in the district court and here, has had in mind, at a minimum, those sections of Newark that are inhabited by persons living below what the Census Bureau denominates as the "poverty level." Unhappily, "poverty level" correlates closely with race. In the northeastern United States (New England, New York, New Jersey and Pennsylvania), 9.2% of whites and 28.9% of blacks are below the poverty level .....

In sum, one cannot, on this record, say with assurance what impact the exclusion of "low-income" Newark residents from jury service in drug cases in the Newark federal

> courthouse would have on the racial composition of such juries. But one can with considerable confidence say that, measured against the racial distribution in the seven-county catchment area as a whole, such exclusion would, to a significant degree, disproportionately disqualify black potential jurors. **[Id at 400-401].**

Judge Pollak thereafter stated that he agreed that facially race-neutral explanations involving a disparate impact should be "scrutinized with care " to determine whether they are a mask for pre-text. In this context he stated that "a reading of the trial transcript does not suggest that the disparate impact on blacks, which the explanation [herein] entails, led the trial judge to undertake any special scrutiny, let alone to weigh the gravity of the probable impact against the substantiality of any legitimate concern of the prosecutor." **Id at 401-402.** Judge Pollak would have remanded this matter to the district for a re-examination of both of the explanations. Judge Pollak stated:

> For the reasons given, I am of the view that this case should be remanded to the district court for a reexamination of both of the

explanations for striking Ms. Lucas -- the postal worker explanation and the "it's a person that may be involved in a drug situation where she lives" explanation --- vouchsafed by the government at voir dire.

I would surmise that in the event of such a remand the government would elect not to pursue the proposition that postal workers as a class ---a class that numbers some 730,000 nationwide, U.S. Postal Service Work Force Profile (Aug. 21, 1992) --- are generically not to be trusted to try federal drug cases. That would leave the more serious question: in a city which is 58.5% black, is the exclusion from jury service in drug cases (which appear to constitute the largest category of federal felony prosecutions) of all persons who live in a "low-income area" compatible with Batson? **[Id at402-403]**.

II.

Certiorari Must Be Granted To Correct The Violation of Petitioner's Rights

Notwithstanding the majority view herein, the United States clearly challenged the potential African-American

juror exclusively on race-based criteria. The first rationale provided to the Court was concededly spurious---the second rationale was manifestly based on bigoted and prejudiced thinking and clearly did not constitute a "neutral explanation related to the case to be tried." **Batson v. Kentucky, supra at 96-98.** The United States had a weak and ambiguous case against a black defendant. Absent any basis in logic or fact, it isolated one of only two potential African-American jurors for removal from the petit jury venire "on the [unfounded] assumption that [the juror would] be unable to impartially consider the case against the black defendant." **Batson v. Kentucky, supra at 89**. Any unbiased evaluation of the United States' explanations for challenging the juror militate in favor of a finding of race-based exclusion requiring reversal of the convictions obtained herein.

ii.

Available Precedent Outside The Third Circuit Supports Position That A Reversal Is Mandated

It is not surprising that this Court's opinion in **Batson** has spawned much clarification litigation of the issue as to use of raced-based peremptory challenged to exclude blacks

from a petit jury. Indeed, there have been several post-**Batson** Supreme Court opinions which have attempted to clarify the Sixth Amendment/Equal Protection distinction. And, several circuit courts have analyzed the nature of a "racially neutral reason" for the government's decision to strike a prospective juror. In this context, it is highly significant that the Fourth Circuit has ruled that the seating of a black juror on the petit jury does not preclude a finding that a black defendant has established a **prima facie** case of **Batson** discrimination. In that case, **United States v. Joe, 928 F.2d 99 (4 Cir. 1991),** the United States used six of its eight peremptory challenges to strike back jurors.

In **United States v. Bennett, 923 F.2d 1543, 1551 (11 Cir. 1991)**, the Eleventh Circuit noted that "the fact that a prospective juror has prior family involvement with drugs charges has been deemed a racially neutral reason for the government to strike under **Batson**." See, **United States v. Alston 895 F.2d 1362, 1367 (11 Cir. 1990). Cf. United States v. Guerra-Marez, 928 F.2d 665, 673 (5 Cir. 1991)** (Struck jurors had drug problems or arrest records). The reason accepted in **Bennett** is a far cry from a claim that

a juror is "probably involved in a drug situation where she lives" because she rents an apartment. The Courts in **Bennett, Alston** and **Guerra-Marez** would clearly not have accepted that as a "racially neutral reason." See, **Murchu v. United States, 926 F.2d 50 (1 Cir. 1991)** (Americans of Irish ancestry were not a cognizable group for **Batson** purposes, absent showing that such persons were as a group singled out for discrimination in society). **Cf. Cunnigham v. Zant, 928 F.2d 1006 (11 Cir. 1991).**[7]

It is submitted that this Court has no just option other than to grant the writ and thereafter reverse the convictions obtained herein. The basis for the challenge herein was clearly related to race. The challenged juror was in no fashion unqualified or incompetent. In this context, we stress that the rationale provided by the prosecutor for the peremptory challenge to the juror is in no sense racially neutral. And, it must be remembered that the rationale adopted by the district court followed the initial offering of a

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7 Inattentiveness or inability to follow the evidence may also be a valid, racially neutral basis for exercising peremptory challenges. However, challenges on this ground deserve careful scrutiny and special care by counsel to fully develop the record concerning the specific behavior motivating counsel to make the challenge. **United States v. Sherrills, 929 F.2d 393, 395 (8 Cir. 1991).**

concededly false basis. The peremptory challenge exercised herein and the stated basis for it do not bespeak a necessarily malevolent or venally racist disposition. However, at a minimum it indicates a lack of sensitivity and an ingrained attitude which deprived both petitioner and the potential juror of a non-discriminatory selection process. We are certain that the juror would be appalled to hear that the prosecutor believes that she is "probably in a drug situation where she lives." That juror is employed by the Post Office and has no history of criminal behavior. See, **United States v. Horsley, 864 F.2d 1543 (11 Cir. 1989)** ("I just got a feeling about" is legally insufficient to refute **prima facie** case of purposeful racial discrimination).

In sum, a dreadful wrong to the constitutional concept of equal protection was committed below which denied a substantial right to a defendant on trial in a criminal matter. "The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts of the [United States] is most compelling in the judicial system." **Powers v. Ohio, supra at 1373**. This Court must act to

eliminate discrimination from the system with a pedagogical reversal of petitioner's conviction.

Point II

Certiorari Sould Be Granted To Resolve The Dispute Between The Third And Ninth Circuits As To Whether Hernandez Required A Nexus Between The Particular Juror And The Facts Of The Case

In, **United States v. Bishop, 959 F.2d 820, 825 (9 Cir. 1992)**, the Ninth Circuit ruled that **Hernandez** "strongly suggests" that a nexus between a particular juror and the facts of the case must exist in order for the prosecutor's explanation of a proposed challenge to be facially valid. See, **United States v. Uwaezhoke, supra at 394, fn 5.** The Third Circuit in **Uwaezhoke** rejected this view. **Id.** We submit the Ninth Circuit's interpretation of **Hernandez** is correct. Moreover, such an interpretation is the singular manner in which pre-textual explanations may adequately be eliminated. This Court must so rule.

Conclusion

For the foregoing reasons, we respectfully request that this Court grant certiorari herein. "Race neutrality in

jury selection [is] a visible, and inevitable, measure of the judicial system's own committment to the commands of the Constitution." **Powers v. Ohio, supra at 1373**. This Court must manifest its committment lest prosecutors be encouraged to engender the "forbidden stereotype" in the selection process. **Id.**

Respectfully Submitted,

ALAN DEXTER BOWMAN
ATTORNEY FOR PETITIONER

RAYMOND A. BROWN
ALAN DEXTER BOWMAN
OF COUNSEL AND ON THE BRIEF

UNITED STATES COURT OFAPPEALS
FOR THE THIRD CIRCUIT

No. 91-5589

UNITED STATES OF AMERICA

v.

NDUCHE CHIMA UWAEZHOKE a/k/a Andy

Appellant

On Appeal From the United States District Court
For the District of New Jersey

(D.C. Criminal Action No. 90-00372-02)

Present: STAPLETON and MANSMANN, Circuit Judges, and POLLAK, District Judge*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 5, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 28,1991, be, and the same is hereby

affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

Acting Chief Deputy Clerk

Certified as a true copy and issued in lieu
of a formal mandate on June 21, 1993

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5589

UNITED STATES OF AMERICA

v.

NDUCHE CHIMA UWAEZHOKE a/k/a Andy

Appellant

SUR PETITION FOR REHEARING

Before: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG HUTCHISON, SCIRICA, COWEN, NYGAARD, ROTH, LEWIS, Circuit Judges, and POLLAK, District Judge* *

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Walter K. Stapleton
Circuit Judge

Dated June 11, 1993